

1 [Appearing Counsel on next page]

FILED

DISTRICT COURT OF GUAM

JUL 26 2007 *ms*

2
3
4
5 DISTRICT COURT OF GUAM

MARY L.M. MORAN
CLERK OF COURT

6 TERRITORY OF GUAM

7
8 JULIE BABAUTA SANTOS, *et al.*,

9 Petitioners,

10 -v-

11 FELIX P. CAMACHO, *et al.*

12 Respondents.

Civil Case No. 04-00006

REPLY IN SUPPORT OF JOINT
MOTION OF PETITIONERS AND
RESPONDENTS IN SANTOS AND
TORRES FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT
AGREEMENT

13
14 CHARMAINE R. TORRES, *et al.*,

15 Plaintiffs,

16 -v-

17 GOVERNMENT OF GUAM, *et al.*,

18 Defendants.

Civil Case No. 04-00038

19
20 MARY GRACE SIMPAO, *et al.*,

21 Plaintiffs,

22 -v-

23 GOVERNMENT OF GUAM,

24 Defendant.

25 -v-

26 FELIX P. CAMACHO, Governor of Guam,

27 Intervenor-Defendant.

Civil Case No. 04-00049

28
ORIGINAL

1 **MICHAEL F. PHILLIPS**
2 **PHILLIPS & BORDALLO, P.C.**

3 410 West O'Brien Drive

4 Hagatña, Guam 96910

5 Telephone: (671) 477-2223

6 Facsimile: (671) 477-2329

7 Interim Class Counsel and Attorneys for Petitioner *Julie Babauta Santos*

8 **IGNACIO C. AGUIGUI**

9 **PETER C. PEREZ**

10 **LUJAN AGUIGUI & PEREZ LLP**

11 300 Pacific News Building

12 Hagatña, Guam 96910

13 Telephone: (671) 477-8064

14 Facsimile: (671) 477-5297

15 Attorneys for Plaintiff *Charmaine R. Torres*

16 **SHANNON TAITANO, ESQ.**

17 **OFFICE OF THE GOVERNOR OF GUAM**

18 Ricardo J. Bordallo Governor's Complex

19 Adelup, Guam 96910

20 Telephone: (671) 472-8931

21 Facsimile: (671) 477-4826

22 **EDUARDO A. CALVO, ESQ.**

23 **RODNEY J. JACOB, ESQ.**

24 **DANIEL M. BENJAMIN, ESQ.**

25 **CALVO & CLARK, LLP**

26 Attorneys at Law

27 655 South Marine Drive, Suite 202

28 Tamuning, Guam 96913

Telephone: (671) 646-9355

Facsimile: (671) 646-9403

Attorneys for *Felix P. Camacho, Governor of Guam*

RAWLEN M.T. MANTANONA

CABOT MANTANONA LLP

BankPacific Buiding, 2nd Floor

825 S. Marine Corps Drive

Telephone: (671) 646-2001

Facsimile: (671) 646-0777

Attorneys for Respondents *Lourdes M. Perez and Artemio R. Ilagan*

1 The only class members who filed objections to Final Approval of the Settlement
2 Agreement in this matter are Mary Grace Simpao and Janice Cruz (hereinafter "Simpao
3 Plaintiffs"), the embittered Plaintiffs in Simpao et al v. Government of Guam, Civil Case
4 No. 04-00049, who, having failed to themselves submit to meaningful negotiations, now
5 attempt to thwart the progress of this meritorious settlement. Simpao Plaintiffs object to
6 final approval of the settlement agreement on four bases: (1) purported lack of sufficient
7 information by which the Court can evaluate effectiveness of notice or the fairness of the
8 settlement; (2) purported inadequacy of notice to Class Members of the potential
9 settlement; (3) that the settlement is purportedly substantively unfair; and (4) that the
10 funding mechanism for the settlement is unlikely to survive a challenge that it is violative
11 of Guam law.
12

13
14 As the Court noted in its Order Granting Preliminary Approval of Settlement
15 Agreement,

16 The court preliminarily finds that the Settlement Agreement
17 is fair, adequate and reasonable after taking into account the
18 fact that litigation is always uncertain and that delays are the
19 norm. In addition, the court finds that the settlement
20 encompassed by the Settlement Agreement was entered
21 into after arm's length negotiations by experienced counsel
22 and is sufficiently within the range of reasonableness so that
23 notice of the Settlement Agreement should be provided to
24 potential class members n6. Accordingly, the terms of the
25 Settlement Agreement are hereby preliminarily approved,
26 and discovery is hereby stayed except to the extent
27 discovery is necessary with respect to opt-outs, if any,
28 and/or purposes of administering and consummating the
Settlement Agreement, subject to further consideration
thereof at the hearing on final settlement (the "Fairness
Hearing").

*Order Granting Joint Motion for Preliminary Approval of Class Action
Settlement Agreement, Joint Motion of the Parties for Conditional
Certification of the EIC Class for Settlement Purposes, Amended Motion
for Appointment of Lead Class Counsel, p 4.*

1 The parties submit to the Court that, Notice requirements having been met and
2 the parties having complied with the Court's orders, the Settlement Agreement meets
3 the requirements of law as it is fair, adequate and reasonable within the meaning of
4 Rule 23. Accordingly, the Court should grant final approval of the Settlement Agreement
5 and thereby ensure that the Class receives immediate and meaningful relief.

6 **A. Adequacy of Record Before the Court**

7 Simpao Plaintiffs challenge the adequacy of the record before the Court to form
8 the basis for final approval of the settlement agreement. Specifically, they contend that
9 the information available to the Court is insufficient for the Court to gauge the fairness of
10 the settlement. Simpao Plaintiffs argue that in order to properly assess the fairness of
11 the settlement agreement, the Court would have to consider information such as the
12 value of the claims class members have filed, the value of the offsets the government
13 will apply to the claims, and the number of class members would actually filed claims.
14 Upon the date of Simpao Plaintiffs objections, they had already received, though
15 inexplicably failed to account for, the information provided in the *Declaration of John P.*
16 *Camacho in Support of Motion for Final Approval of Class Action Settlement Agreement.*
17

18
19 The Declaration evidences the filing of over fifty-four thousand (54,000) claims,
20 which the Department of Revenue and Taxation compiled according to year, status, and
21 processing date. Further, per the Summary of Claims processed, approximately thirty
22 thousand (30,000) claims had been processed and/or paid out by May 18, 2007, totaling
23 over fifty-two million dollars (\$52,000,000.00), before offsets. Offsets accounted for
24 approximately 18% of the ten million, five hundred fifty-six thousand, two hundred thirty-
25 four dollars and thirteen cents (\$10,556,234.13) of the total 1997 and 1998 claims
26 refunded as of that date. The data is understandably incomplete, as the deadline to
27 complete processing for some twenty thousand (20,000) claims has yet to elapse.
28 However, such data will likely be available for the Court's review prior to the fairness

1 hearing in this matter, presently scheduled for September 20, 2007. Given the current
2 data before the Court however, it is clear that the parties have complied with the Court's
3 reporting requirements, and will continue to comply as more data becomes available.

4 **B. Adequacy of Notice**

5 Simpao Plaintiffs also challenge the sufficiency of the record before the Court as it
6 pertains to Notice given to Class Members of the potential settlement pursuant to the
7 Court's Order of January 9, 2007. Again, the Department of Revenue and Taxation
8 documented the notice it effected via the requirements the Court set forth in its Order,
9 and though data is not finalized regarding the number of valid claims, it is clear that DRT
10 has complied and intends to comply with the Court's reporting requirements. As the
11 Court found:
12

13 **NOTICE TO POTENTIAL CLASS MEMBERS**

14 7. Rule 23(e) requires that once the parties obtain
15 preliminary approval of their settlement, "[t]he court must
16 direct notice in a reasonable manner to all class members
17 who would be bound by a proposed settlement, voluntary
18 dismissal, or compromise." FED. R. CIV. P. 23(e). Proper
19 notice should:

- 20 -- define the class and subclass;
- 21 -- describe clearly the options open to the class members
22 and the deadlines for taking action;
- 23 -- describe the essential terms of the proposed settlement;
- 24 -- disclose any special benefits provided to the class
25 representatives;
- 26 -- provide information regarding attorney fees;
- 27 -- indicate the time and place of the hearing to consider
28 approval of the settlement, and the method for objecting to
the settlement;
- explain the procedures for allocating and distributing
settlement funds;

1 -- provide information that will enable class members to
2 calculate or at least estimate their individual recoveries,
3 including estimates of the size of the class and any subclass;

4 -- explain the procedures for allocating and distributing
5 settlement funds; and

6 -- prominently display the address and phone number of
7 class counsel and the procedure for making inquiries.

8 Manual for Complex Litigation, Fourth, § 21.312. Rule 23
9 essentially gives the court complete discretion as to the
10 manner of service of settlement notice. See Franks v. Kroger
11 Co., 649 F.2d 1216, 1222-1223 (6th Cir. 1981).

12 The parties propose that each class member be mailed a
13 notice of the proposed class action settlement, as well as
14 providing notice by publication. The proposed notice
15 adequately describes the facts underlying this action. The
16 proposed notice describes who members of the class are,
17 and it provides the terms of the settlement. The proposed
18 notice provides information regarding attorney's fees. The
19 proposed notice provides information on how class members
20 may object to the settlement, and clearly indicates contact
21 information for both class counsel and defense counsel.
22 Thus, the court conditionally approves the proposed notice,
23 subject to the inclusion of the pertinent dates.

24 *Order, supra* at 10-11.

25 As provided in the Declaration of John P. Camacho in support of Motion for Final
26 Approval of Class Settlement, Notice of Pendency and Proposed Settlement of Class
27 Action was mailed to Class Members in compliance with the Court's order and with the
28 Settlement Agreement, which provides in relevant part:

29 II. CLASS NOTICE

30 ...

31 b. Notice by publication shall include the publication of
32 Exhibit "C" in a full-page advertisement reprinted in full twice
33 weekly for not less than four consecutive weeks in the
34 Pacific Daily News an Marianas Variety. Publication in the
35 Pacific Daily News shall include Sunday and any one other
36 day. Publications in the Marianas Variety shall include any
37 two days. Notice by publication shall commence on the first

1 Sunday that occurs at least seven (7) days after the Court
2 orders the publication of the class notice.

3 c. Individual notice shall consist of DRT mailing Exhibit "C" to
4 the last known address of the individuals who may fall within
5 the EIC Class whose identity it is reasonably practicable to
6 identify and shall be accomplished as follows:

7 i. DRT shall first assemble a list of all persons who it is
8 reasonably practicable to identify who may belong to the EIC
9 class. The list shall be developed by assembling a list of the
10 names and social security number (or taxpayer identification
11 number) of the following persons:

12 ...
13 6. By comparing social security numbers (or taxpayer
14 identification numbers), DRT shall then combine the lists
15 developed into one master list.

16 ii. Once DRT has assembled its master list based on the
17 foregoing provisions, DRT shall match each name and social
18 security number (or taxpayer identification number) identified
19 with the last known address appearing on DRT's
20 computerized records.

21 iii. Except as otherwise specified herein, the Parties have
22 determined that it is not reasonably practicable for DRT to
23 identify any tax filings not yet entered into DRT's computer
24 system or to use such un-entered filings in its determination
25 of individuals or their last known addresses because this
26 would substantially delay or even prevent DRT's completion
27 of its list.

28 iv. One copy of Exhibit "C" shall then be mailed to each
person so identified at the address so identified. Persons
identified as potential class members who have potential
claims in multiple tax years shall be mailed only one copy of
the notice.

v. DRT shall complete its list of individuals and last known
addresses, and shall mail Exhibit "C" by first class mail to
each individual at their last known address, no later than 35
days after the Court orders the publication of the Class
Notice.

vi. The Parties acknowledge that it is unlawful under federal
law and territorial to disclose individual taxpayer information
to any third party except for as authorized by law. None of
the forgoing provisions regarding individual notice shall be
construed to require such unauthorized disclosures, and
DRT shall maintain the confidentiality of the master list and
all other lists developed under the forgoing provisions.

d. The completion of the notice by publication and the
mailing of the individual notice at the times stated herein
shall constitute completion of the "Class Notice Period."

1 *Declaration of Daniel M. Benjamin in Support of Joint Motion of the Santos and Torres*
2 *Parties for Preliminary Approval of Class Action Settlement Agreement; Memorandum*
3 *of Points and Authorities in Support Thereof, Exhibit 1.*

4 To the extent that Simpao Plaintiffs challenge the form and content of the notice,
5 such matters are firmly left to the discretion of the Court. See Gainey v. Occidental Land
6 Research, 186 Cal. App. 3d 1051, 1057-1058 (Cal. Ct. App. 1986) ("The form and
7 content of the notice to the class of pendency of the class action is regulated by the
8 court...The notice is a matter of extreme importance, committed to the discretion of the
9 court, not the whim of litigants. The mechanism selected for accomplishing this is the
10 class notice, which is designed to present the relevant facts in an unbiased format. The
11 process of creating such a notice [involves the court and the parties working together]")
12 (citations omitted). Here, where the parties produced substantive notice, with guidance
13 and approval from the Court regarding the sufficiency of the information contained
14 therein, and where the notice the parties mailed and published reflects the information
15 and format approved by the Court, the parties submit that the form and content of the
16 notice meets the requirements of law.

17
18
19 Simpao Plaintiffs also criticize the method the parties utilized to disseminate
20 notice to Class Members. In support of their objections, Simpao Plaintiffs submitted a
21 Declaration of Gina M. Intrepido, a purported expert in legal notice dissemination, who
22 details a number of criticisms regarding the methodology employed by the Department
23 of Revenue and Taxation and in so doing, demonstrates her own unfamiliarity with the
24 practicability of implementing the virtual wishlist of legal notice dissemination she
25 recommends the parties implement.

26
27 Due process does not require actual notice of all Class Members. See In re
28 Prudential Secs. Ltd. Pshps. Litig., 164 F.R.D. 362, 368 (D.N.Y. 1996) ("[i]t is widely

1 recognized that for the due process standard to be met it is not necessary that every
2 class member receive actual notice, so long as class counsel acted reasonably in
3 selecting means likely to inform persons affected")(citing Weigner v. The City of New
4 York, 852 F.2d 646, 649 (2d Cir. 1988), cert. denied, 488 U.S. 1005, 102 L. Ed. 2d 777,
5 109 S. Ct. 785 (1989) ("the proper inquiry is whether [class counsel] acted reasonably in
6 selecting means likely to inform persons affected, not whether each [class member]
7 actually received notice"); Silber v. Mabon, 18 F.3d 1449, 1453-54 (9th Cir. 1994); In re
8 VMS Limited Partnership Sec. Litig., No. 90 C 2412, 1995 U.S. Dist. LEXIS 8079, *3,
9 1995 WL 355722 at *2 (N.D. Ill. June 12, 1995); Trist v. First Federal Savings & Loan
10 Assoc. of Chester, 89 F.R.D. 1, 2 (E.D. Pa. 1980) ("Mullane has never been interpreted
11 to require the sort of actual notice demanded by the defendants, but rather only notice
12 reasonably calculated to apprise interested parties of the nature of the object"). Further,
13 "[t]he Court is granted the power to direct the means of providing notice, subject only to
14 these broad 'reasonableness' standards imposed by due process." In re Prudential
15 Secs. Ltd. Pshps. Litig., supra at 368 (citing Grunin v. International House of Pancakes,
16 513 F.2d 114, 121 (8th Cir.) cert. denied, 423 U.S. 864, 46 L. Ed. 2d 93, 96 S. Ct. 124
17 (1975)).

20 Ms. Intrepido is of the opinion that the DRT could have undertaken a variety of
21 tasks in an attempt to update their address databases to accommodate sociological and
22 mobility factors on Guam. Ms. Intrepido also offers what reads to be a policy concern as
23 to the propriety of excluding tax filings that were not yet entered into the DRT's
24 computer system.

26 However, none of Ms. Intrepido's suggestions are mandated by law. The parties'
27 decision to send notice to the last known addresses of Class members does not defeat
28 the reasonableness of notice. In In re Prudential Secs. Ltd. Pshps. Litig., 164 F.R.D.

1 362, 368 (D.N.Y. 1996), the Court was confronted with determining the reasonableness
2 of notice mailed to last known addresses of class members. The Court found:

3 In complying with this Order, Class Counsel had notice
4 mailed to each identifiable Class Member's last known
5 address, a procedure that has been given wide-spread
6 approval in other class actions. See, e.g., Grunin, 513 F.2d
7 at 121 (mailing notice to last known address of class
8 members constitutionally adequate even where one-third of
9 class members were not reached by mailing); Weinberger v.
10 Kendrick, 698 F.2d 61, 71 (2d Cir. 1982), cert. denied, 464
11 U.S. 818, 78 L. Ed. 2d 89, 104 S. Ct. 77 (1983) (rejecting
12 appellants' contention that the mailing of individual notice to
the last known addresses of all class members was
inadequate); Trist, 89 F.R.D. at 3 (approving notice
procedure, stating "the failure to send notice to 37 or even
137 must be considered together with the fact that notice
was given to 25,000 other similarly situated class members
without provoking a single objection").

13 Likewise, in this matter, sending notice to the last known address of class
14 members is both practicable and reasonable, particularly given the relative
15 concentration of most Class Members in a geographic area as small as Guam's.
16 Similarly, Ms. Intrepido cries foul because the parties did not provide data on the
17 recommended publications "selected" in this matter, further demonstrating just how
18 removed her Philadelphia-based firm is from the realities of Guam notice publication.
19 Publication via the Pacific Daily News and the Marianas Variety is standard practice in
20 Guam Courts. These publications are widely-read, widely-available, regular, and are the
21 typical publications in which legal notices would appear.

22 The parties acknowledge that there are potential tactics available for improving or
23 focusing notice methodology on Guam. However, fulfillment of the bottomless
24 possibilities does not govern this inquiry. The standard is reasonableness, and the
25 parties submit that the notice provided in this matter complies with the Court's order, the
26 current notice practice on Guam, and the requirements of due process. The notice the
27
28

1 parties effected in this matter is both reasonable and practicable, and the Court should
2 not sustain Simpao Plaintiff's objections to final approval on this basis.

3 **C. Substantive Fairness of the Settlement Agreement**

4
5 Simpao Plaintiffs, as expected, reiterate their now-familiar argument that the
6 settlement agreement in this matter is purportedly unfair (1) as it purportedly creates
7 conflict among the class members in that it abandons recovery of interest, (2) its funding
8 mechanism is purportedly illusory, (3) the pre-approval "payout" of 1997 and 1998 is
9 allegedly coercive, and (4) the compensation provided in the settlement is "woefully
10 inadequate." None of these arguments are novel. Petitioners have addressed them time
11 and again, most recently in the Joint Reply in Support of Petitioners' Motion for Final
12 Certification of the EIC Class. Regarding interest, the purportedly coercive payout, and
13 the Simpao Plaintiffs' desire for greater compensation, these were factors considered
14 and compromised in settlement negotiations. As noted in the Joint Reply in Support of
15 Petitioners' Motion for Final Certification of the EIC Class, settlement entails
16 compromising a portion of the Class's potential claim in order to receive immediate and
17 meaningful compensation while minimizing the Class's exposure to the risks associated
18 with full litigation.

19 Finally, the funding mechanism provided in the settlement agreement is the most
20 efficient method by which the Class can be ensured compensation. Funding for the
21 Settlement Agreement benefits will be made by reserving a minimum of 15% of each
22 amount set aside or earmarked by the Government or Legislature for income tax refunds
23 and placed into either the Income Tax Reserve Fund or the Income Tax Refund Efficient
24 Payment Trust Fund. Settlement Agreement § V. And in order to assure the class that
25 such funds are being set aside, the Guam Department of Administration ("DOA") will
26 provide monthly reports.

27 By providing funding mechanisms for each expenditure under the Settlement
28 Agreement, the Agreement addresses concerns regarding the Illegal Expenditure Act (5

1 G.C.A. § 22401) that had caused, in part, opposition to the previous settlement
2 agreement of June 14, 2004. However, the Settlement Agreement also provides the
3 flexibility for the Governor to utilize other funding sources to satisfy the Government's
4 obligations under the Settlement Agreement, as permitted by law. Notably, the
5 Agreement leaves the Respondents free to pursue federal reimbursement of the EIC,
6 while providing the class with a final resolution and payment of their claims now (see
7 Settlement Agreement § X(e)).

8 **D. Funding Mechanism Does Not Violate Guam Law**

9 Allegations that the funding mechanism in the Settlement Agreement violates
10 Guam law are, again, not new in this case. Petitioners and Respondents litigated this
11 issue and ultimately negotiated it in settlement. Petitioner Santos briefed these issues
12 extensively in Petitioner's Response to Respondent Governor's Objection to Petitioner's
13 Motion for Approval of the Administration Plan, filed on December 8, 2004 which the
14 parties incorporate herein in its entirety. The parties decline to brief this issue further in
15 light of the extensive briefing already on the record before the Court.
16

17
18 **CONCLUSION**

19 For the reasons stated herein and those forthcoming in oral arguments, the
20 Moving Parties respectfully request that the Court (1) grant final approval of the
21 Settlement Agreement; (2) grant final certification of the EIC class as defined in the
22 Settlement Agreement for settlement purposes; and (3) grant such other and further
23 relief as the Court deems just and proper.
24

25 //

26 //

27 //

28 //

1 Respectfully submitted this 26th day of July, 2007.

2
3 **PHILLIPS & BORDALLO, P.C.**

4 Interim Class Counsel & Attorneys for
5 Petitioner Julie Babauta Santos

6 By: 

7 **MICHAEL F. PHILLIPS**

8 **LUJAN AGUIGUI & PEREZ LLP**

9 Attorneys for Plaintiff Charmaine R.
10 Torres

11 By: 

12 **IGNACIO C. AGUIGUI**